

After reviewing the record and considering the arguments of the parties, the Appeals Board finds as follows:

(1) This claim arises from a December 12, 1991, back injury claimant suffered while working for respondent. Following back surgery, claimant returned to his regular job with respondent, but with restrictions. Portions of his job exceeded those restrictions. The positions previously taken by claimant and respondent concerning whether or not claimant's restrictions were accommodated by respondent have reversed. Before this review and modification proceeding, respondent insisted that it accommodated those restrictions. Claimant disputed that assertion then but does not now. Although claimant worked at times outside his restrictions, the Appeals Board finds that respondent attempted to accommodate claimant's restrictions. Therefore, claimant returned to an accommodated job.

(2) The original Award was entered on September 20, 1996, by Special Administrative Law Judge Michael T. Harris. It awarded permanent partial general body disability benefits based upon a 20 percent work disability. Finding claimant had a 40 percent labor market access loss but no wage loss, both factors were then weighted equally and averaged to produce the 20 percent work disability.

(3) Respondent and its insurance carrier appealed that Award to this Board. By Order dated December 17, 1996, permanent partial disability benefits were reduced to 11 percent based upon the claimant's impairment of function. The Board applied the presumption of no work disability found in K.S.A. 1991 Supp. 44-510e(a). Because claimant had returned to work for respondent "in the same or similar positions and at a higher wage for a period of years" the Appeals Board found the evidence of loss of labor market access and loss of wage earning ability failed to overcome the presumption against awarding a work disability.

(4) Respondent's refinery where claimant was employed was closed on September 27, 1996, and claimant was laid off. Claimant filed an Application for Review and Modification on December 23, 1996. In that application, claimant alleged his work disability had increased as a result of his being terminated by respondent. Claimant asked that his disability award be increased to an amount commensurate with his actual work disability. Although claimant also argued a change in his physical condition, the Board finds no change has been proven.

(5) On September 19, 1997, Assistant Director Avery denied claimant's request for modification of his previous award finding that because claimant was returned to an unaccommodated job and was subsequently laid off, he was precluded from seeking a work disability by the holding of the Kansas Court of Appeals in Watkins v. Food Barn Stores, Inc., 23 Kan. App. 2d 837, 936 P.2d 294 (1997).

CONCLUSIONS OF LAW

The Appeals Board finds that the job claimant returned to with respondent following his injury was an accommodated job. Therefore, Watkins does not apply. Claimant is entitled to an award based upon his work disability following Lee v. Boeing Co., 21 Kan. App. 2d 365, 899 P.2d 516 (1995).

The definition of work disability has undergone several legislative revisions since the Workers Compensation Act was first enacted. For example, before the July 1, 1987 amendments to K.S.A. 44-510e(a), the definition of work disability was tied to the job the claimant was performing at the time of his injury.

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the workman to engage in work of the same type and character that he was performing at the time of his injury, has been reduced. K.S.A. 44-510e(a) (Ensley).

In 1987, however, the Kansas Legislature amended the definition of work disability to not tie it to the type of job the claimant was performing at the time of his injury, but instead to the entire open labor market.

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation

Nevertheless, the Kansas Court of Appeals in Watkins considered this amended version of the statute and held that if an injured worker has the ability to return to his former job without any accommodations then, absent a change in his physical condition, he is precluded from receiving a work disability.

If following an injury an employee is physically able to return to work, perform his or her job duties without special accommodation, and earn a wage comparable to his or her pre-injury wage, then by definition that employee does not have a work disability. See K.S.A. 1992 Supp. 44-510e(a).

Watkins at 839.

As stated, the Assistant Director found claimant returned to work without special accommodation and, therefore, applied the rule announced in Watkins to deny claimant a work disability in this case. The Appeals Board agrees with the reasoning of the Assistant Director, but based upon its different factual determination, finds that the Award entered by the Assistant Director should be reversed.

Although claimant returned to the same job he had performed prior to his injury, respondent made arrangements to accommodate claimant's restrictions. Claimant was

instructed to always seek assistance in any job task which exceeded his restrictions. Furthermore, he was instructed to work at his own pace to avoid additional injury. Claimant was specifically assigned to two-man crews so that there would always be someone available to assist him. His co-workers also did what they could to take care of him. The Appeals Board finds that because claimant returned to an accommodated job, he is entitled to consideration for a work disability.

The evidence is compelling that claimant's ability to perform work in the open labor market and to earn comparable wages has been reduced to an extent which would exceed his percentage of functional impairment. However, as the Assistant Director did not reach that issue and as respondent and its insurance carrier were unwilling to stipulate to the Board determining the nature and extent of claimant's disability without it first having been determined by an administrative law judge upon review and modification, the Appeals Board finds that this matter should be remanded to the Assistant Director, or to an administrative law judge as the Director may designate, for a determination of that issue.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the September 19, 1997, Review and Modification of an Award entered by Assistant Director Brad E. Avery should be, and is hereby, reversed and remanded with directions to specifically decide the remaining issue of nature and extent of claimant's disability.

IT IS SO ORDERED.

Dated this ____ day of March 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Orvel Mason, Arkansas City, KS
Richard J. Liby, Wichita, KS
Nelsonna Potts Barnes, Administrative Law Judge
Brad E. Avery, Assistant Director
Philip S. Harness, Director